National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 18, 1995

TO: Victoria E. Aguayo, Regional Director, Region 21

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Earthmovers, Inc., d/b/a Terra Movers, Inc., Case 21-CA-30519; Earthmovers, Inc., d/b/a Terra Movers, Inc., Case 21-CA-30529

506-6090-6600, 506-6090-6800, 506-6090-8000

This Section 8(a)(1) case was submitted for advice as to whether the Charging Party was engaged in protected concerted activity when he asked the Navy Department about the legality of a clause in the collective-bargaining agreement between the Union and his Employer, which had a contract to perform work for the Navy Department.

FACTS

The Employer performs work at a Navy Department facility under a contract with Hunt Building Corporation, the prime contractor. The federal Davis-Bacon Act[(1)] applies to the compensation and benefits, including pension fund contributions, provided to employees performing this work. The Employer and Employees of Professional Organizations Labor Union (the Union) are parties to a collective-bargaining agreement that requires the Employer to make pension fund contributions on behalf of unit employees. That contract apparently states that employees' pension fund rights vest only after they have worked for the Employer for a minimum of five years.[(2)]

Charging Party Nemesio Aguirre was hired by the Employer on June 29, 1994. Upon learning of the five-year pension vesting requirement from a Union letter, Aguirre became dissatisfied because he wanted a shorter vesting period. He started asking questions about the pension plan of Hunt employees, who told him to talk with Navy Department officials. Nonetheless, when Aguirre told the Employer on August 19, 1994, that he was quitting his job, he stated that he was quitting because of the 60-mile commute between his home and the worksite. Aguirre then worked through August 22, 1994. On or about August 23, 1994, Aguirre contacted Navy Labor Relations Specialist Gloria Cutler and complained about the length of the pension vesting period. Cutler told Aguirre that she would investigate his complaint.

On or about August 26, 1994, the Employer called Aguirre and asked him to return to work. Aguirre stated that he wanted to be honest and "up-front" with the Employer and told him about his complaint to the Navy Department about the pension-vesting schedule. According to Aguirre, the Employer replied, "Knowing what you have done, there would be no way I could take you back."

On September 14, 1994, Aguirre wrote to the Union president and to the Employer, requesting specific documents relating to his pension benefits; he received no responses to those letters.

Employer and Union officials have met with Cutler. At a meeting held on September 7, 1994, the Employer told Cutler that it knew that Aguirre was filing a claim against it concerning the pension plan. The Navy Department has since referred questions concerning the lawfulness of the contractual pension plan to the Department of Labor, which is investigating the matter.[(3)]

Aguirre alleges that the Employer advertised job vacancies in October 1994, that he called the Employer and asked to be rehired into his old position, and that the Employer stated that it would not rehire him, especially after he had sent letters to various government agencies complaining about the pension plan provisions.

Aguirre claims, and the Union president agrees, that Aguirre reported the Employer's refusal to rehire him to the Union president. This conversation apparently took place on February 13, 1995.

There is no evidence that Aguirre ever discussed his objections to the contractual pension plan with other employees or with the Union before he contacted the Navy Department.

This charge, which alleges that the Employer refused to rehire Aguirre because he complained to the Navy Department, was filed on February 6, 1995.[4]

ACTION

We conclude that complaint should issue, absent settlement.

Initially, we conclude that because Aguirre's complaint to the Navy Department related to a provision in the applicable collective-bargaining agreement, the question of whether he was engaged in protected concerted activity when he did so is more appropriately analyzed under NLRB v. City Disposal Systems[5] than under Meyers Industries.[6] Under City Disposal, an employee who asserts a contractual right is deemed to be engaging in protected, concerted activity even if he acts alone and has not discussed his concerns with other employees. As the Court noted,

...when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees....A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.[7] Meyers, on the other hand, analyzes the question in situations where the subject in dispute does not involve a collective-bargaining agreement. Thus, in Springfield Air Center,[8] where an ALJ relied on City Disposal in finding concerted the refusal of two employees who were not covered by a contract or represented by a union to perform certain work which they believed violated Federal Aviation Administration requirements, the Board stated, at 1151 fn. 1, in affirming the ALJ's conclusion, that it was relying on Meyers rather than upon City Disposal.

Next, we conclude that although Aguirre did not discuss his problems about the pension plan with employees, his actions were concerted under City Disposal. Here, Aguirre questioned the lawfulness, in light of the Davis-Bacon Act, of contractual provisions concerning the pension provision applicable to other employees as well as to himself. The fact that Aguirre was challenging, rather than invoking, a contractual term does not render the City Disposal analysis inapplicable to his actions.[9] Hence, since the heart of Aguirre's dispute with his Employer concerned a contractual term, Aguirre was engaging in protected concerted activity when he sought information about the lawfulness of that provision.[10]

The existence of the collective-bargaining agreement that was supposed to comply with the Davis-Bacon Act distinguishes this case factually from Alleluia Cushion, 221 NLRB 999 (1975), where the Board held that it would treat as concerted a single employee's complaint to a government

agency about terms and conditions of employment. Moreover, in Meyers II, 281 NLRB at 887-888, the Board overruled Alleluia Cushion.[11] The applicability of City Disposal to this case makes it unnecessary to analyze this case in light of Alleluia Cushion.

Accordingly, a Section 8(a)(1) complaint should issue, absent settlement.

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[1] 40 U.S.C. Sec. 276a.

[2] The Region has been unable to obtain a copy of this contract. However, no party disputed the Charging Party's contention that the contract contains the above vesting provision.

[3] The precise Davis-Bacon questions concerning the contractual pension plan are not relevant to the question submitted to the Division of Advice.

[4] The Region has concluded that complaint is warranted in Case 21-CB-11878, which alleges that the Union unlawfully failed and refused to provide Aguirre with a copy of its collective-bargaining agreement with the Employer and with a copy of the Union's constitution and bylaws, even though Aguirre began requesting these documents on August 26, 1994. The merits of this charge were not submitted to Advice.

[5] 465 U.S. 822 (1984).

[6] Meyers I, 268 NLRB 493 (1984), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), on remand, Meyers II, 281 NLRB 882 (1986), enfd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[7] 465 U.S. at 832.

[8] 311 NLRB 1151 (1993).

[9] Cf. International Association of Fire Fighters, 304 NLRB 401, 430-31 (1991) (under City Disposal, employer violated Section 8(a)(3) and (1) by discharging employee who asserted that contract should provide overtime compensation for employees who attended functions held after normal business hours).

[10] Pete O'Dell & Sons Steel Erectors, 277 NLRB 1358 (1985), is distinguishable. In that case, which issued in between the Board's Meyers I and II decisions, the Board concluded that an employee of an unorganized employer who cooperated in an investigation of whether the employer was complying with the Davis-Bacon Act was engaged in protected concerted activity, because he was aiding a union that had filed a complaint with U.S. Army Corps of Engineers. Thus, the Board found that the employee's actions were concerted under the theory set forth in Meyers I.

[11] However, Chairman Gould and Member Browning have recently questioned the continuing vitality of Meyers II. See Liberty National Products, 314 NLRB 631 fn. 4 (1994). Accordingly, the General Counsel has decided to put before the Board selected cases that involve Alleluia Cushion questions. See, e.g., Industrial Construction Services, Case 27-CA-13243, Advice Memorandum dated November 23, 1994 (case settled).